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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 275

NORTH COAST TRANSPORTATION COMPANY, A CORPORATION, AND INDEPENDENT STAGES, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WEST COAST BUS LINES, LTD., ET AL.,

Appellees.

STATEMENT OF BASIS UPON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE DECREE IN QUESTION.

Pursuant to Rule 12, paragraph 1, of the Supreme Court of the United States, appellants above named file this their statement of the basis upon which said appellants contend that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question, as follows:

1. The appeal herein is from a decree, designated by its terms as a "final decree", made and entered by a District Court of the United States specially constituted under section 47 of Title 28 of the United States Code in a case brought by appellants under sections 41 (28), 43 to 45, 45a, 46, 47, 47a and 48 of Title 28 of the United States Code and,

as provided in section 47a of Title 28 of the United States Code (Sec. 210 of Judicial Code, as amended), a direct appeal to the Supreme Court of the United States may be taken from "a final judgment or decree" made by such specially-constituted District Court.

It is further provided by section 238 of the Judicial Code, as amended (28 U. S. C. A. section 345), that a direct review by the Supreme Court may be had where such decree is rendered under section 47a of Title 28 of the United States Code.

2. The decree appealed from was made and entered on the 9th day of May, 1944.

3. The application for appeal was presented on June 10, 1944.

4. It is provided in and by the decree appealed from that the Court vacated the temporary injunction theretofore granted by the Court and dismissed plaintiffs' suit to enjoin, set aside and annul, as far as it relates to operations between Portland, Oregon, and Seattle, Washington, an order of the Interstate Commerce Commission made on October 6, 1942, granting to West Coast Bus Lines, Ltd., a certificate of public convenience and necessity to operate as a common carrier of passengers between San Francisco and Seattle. It was alleged in the complaint that the Commission acted without jurisdiction or authority and in violation of the provisions of Section 205(a) of the Motor Carrier Act (49 U. S. C. A. section 305) in denying plaintiffs' motion to refer the application for a certificate to a Joint Board for hearing and disposition, that the Commission's order is beyond its authority and contrary to law and violates the constitutional rights of the plaintiffs, and is in contravention of the provisions of the Fifth Amendment to the Constitution of the United States, for the reasons

set forth in said complaint, that there are no findings sufficient to support the order of the Commission, and that there is no substantial evidence to support the order or to support the purported general finding of the Commission that the present and future public convenience and necessity require the bus operations proposed by the applicant between Portland and Seattle.

Appellants rely mainly upon three principal grounds of appeal which are of a most fundamental and substantial character and may be stated in summary form as follows:

(a) The report and order of the Commission and the inferences or statements in the report upon which the order was based (here regarded as "findings") are not supported by any substantial evidence, and are, in fact, contrary to the evidence.

(b) It was not the intent of West Coast Bus Lines, Ltd., either at the time of the hearing or at the time of filing the application, or at any other time, to serve more than three states and it was therefore mandatory under the provisions of Section 205 of the Motor Carrier Act (49 U. S. C. A. 305) to refer the matter for hearing and primary decision to a joint board of the three states in which alone the applicant sought to operate.

(c) Owing to the unprecedented and radical changes in conditions between the time of the hearing in 1938 and the final decision in 1942, the Commission should have granted a further hearing for which appropriate application was made, and the failure to reopen the proceeding was a denial of the right to a fair hearing, particularly in view of the fact that the Office of Defense Transportation had in the meantime, in conformity with the national policy to eliminate and curtail all unnecessary duplications in service, and prior to the final decision of the Commission, required curtailment of the bus services rendered by the plaintiffs herein.

5. The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Alton Railroad Co., et al., v. *United States of America, et al.*, 315 U. S. 15, 86 L. ed. 586; *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 86 L. ed. 971; *Purcell, et al.*, v. *United States, et al.*, 315 U. S. 381, 86 L. ed. 910; *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 284 U. S. 248, 76 L. ed. 273.

6. A copy of the opinion of the specially-constituted District Court is appended hereto, marked Exhibit "A".

Dated: June 9, 1944.

Respectfully submitted,

JOHN O. MORAN,
FREDERICK W. MIELKE,
FERD J. SCHAAF,
FRED C. DORSEY.

EXHIBIT "A".

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

NORTH COAST TRANSPORTATION COMPANY, a Corporation, and INDEPENDENT STAGES, INC., a Corporation, *Plaintiffs*,

vs.

THE UNITED STATES OF AMERICA, *Defendant*,

and

WEST COAST BUS LINES, LTD., INTERSTATE COMMERCE COMMISSION, et al., *Interveners*.

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Opinion.

Before WILBUR, Circuit Judge, and ST. SURE and GOODMAN, District Judges.

ST. SURE, District Judge:

North Coast Transportation Company and its wholly owned subsidiary, Independent Stages, Inc., plaintiffs, hold separate certificates of public convenience and necessity for the operation of passenger bus lines between Portland, Oregon, and Seattle, Washington. They sue the United States to set aside an order of the Interstate Commerce Commission (41 M. C. C. 269) granting to West Coast Bus Lines, Ltd., a certificate of public convenience and necessity to operate as a common carrier between San Francisco, Portland, and Seattle. Plaintiffs seek to set aside the order only insofar as it would grant rights between Portland and

Seattle. With the consent of the Commission this Court granted a temporary injunction, restraining operations under the certificate pending a decision on the merits. The Interstate Commerce Commission, West Coast Bus Lines, Ltd., National Trailways System, Santa Fe Trail Transportation Company, and Burlington Transportation Company are interested interveners. The case was heard before a statutory three-judge court.

On April 19, 1938, West Coast Bus Lines filed application with the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing operation as a common carrier between Phoenix, Arizona, Los Angeles and San Francisco, Portland, Oregon, and Seattle, Washington. Plaintiffs, who were operating passenger buses between Portland and Seattle, and other companies operating in the areas affected by the application, protested the granting of the certificate. A hearing was held before a Commissioner examiner; voluminous testimony was taken; and the record was closed on October 5, 1938. During the hearing plaintiffs moved that the matter be assigned to a joint board as provided for in Section 205(a) of the Motor Carrier Act (49 U. S. C. A. Sec. 305(a), on the ground that the application as amended by the proof was for an operation proposed to be conducted in only three states; California, Oregon and Washington; and that the assignment to such joint board was therefore mandatory. The motion was denied. In 1939 briefs were filed by all parties, and plaintiffs' motion was renewed. On August 2, 1940, another Commission examiner submitted a report and recommended order, recommending that a certificate be granted to West Coast to operate between San Francisco, Portland and Seattle, and that a certificate to operate between Phoenix and San Francisco be denied. During the same month plaintiffs and other protestants moved to strike this report and order. The motions were denied by Division 5 of the Commission. On November 4, 1940, plaintiffs filed "Exceptions to Report and Order Recommended by Examiner F. H. Schweickhardt, Brief in support of Exceptions, Request for Oral Argument, Petition for Reopening to Take Further Evidence." The motion to reopen was denied. On March 9, 1942, Division 5 of the Commission issued a report and

order denying the application of West Coast in its entirety. On May 8, 1942, West Coast petitioned for reconsideration by the full Commission. On October 6, 1942, the Commission by a six to four majority reversed Division 5 and granted West Coast a certificate to operate between San Francisco, Portland, and Seattle. On December 12, 1942, plaintiffs petitioned for a stay of the order granting the certificate and for reopening and further hearing. The petition was denied by the Commission, and thereafter the present action was commenced.

Plaintiffs contend (1) that the Commission erred in denying plaintiffs' motion to refer the application of West Coast Bus Lines to a joint board for hearing and disposition; (2) that the evidence is insufficient to support the order granting the certificate to West Coast; (3) that the findings of the Commission are insufficient to support the order granting the certificate to West Coast; (4) that if the order is allowed to stand plaintiffs' constitutional rights under the Fifth Amendment will be violated; and (5) that it was an abuse of discretion for the Commission to refuse to reopen the proceeding to admit evidence of changed conditions occurring after the record was closed.

1. Section 205(a) of the Motor Carrier Act (49 U. S. C. A. Sec. 305(a)) provides in part:

"The Commission shall, when operation of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, * * * refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this chapter with respect to such operations * * *; Applications for certificates, * * *. The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor carrier or brokerage operations involved in such matter are or are proposed to be conducted: * * *."

In its application West Coast proposed to conduct operations in four States. At the hearing the evidence shows that it virtually abandoned its proposal to operate between Arizona and California, and limited its showing to California, Washington and Oregon.

The question is, where an application proposing operations in more than three states is assigned to an examiner, and the proof offered by applicant substantially relates to only three states, is it then mandatory that the proceeding be reassigned to a joint board? We think the statute cannot be so interpreted. "Applications for certificates" are included in the "matters" to be referred to a joint board. In making the reference, the operation proposed by the applicant must necessarily be determined from the application rather than from the supporting evidence. In disposing of plaintiffs' contention Division 5 of the Commission said (32 M. C. C. 621): "In the absence of any showing of any intentional deception or fraud, an application, once lawfully referred either to an examiner or to a joint board of either three or two members, may properly be disposed of by such referee, even though during the course of the hearing applicant wholly fails to support or otherwise abandons his proposal as to one or more states, so that the number actually finally involved is less than originally appeared. Any other conclusion would tend to uncertainty and confusion. In innumerable hearings, jurisdictional issues, requiring final determination before proceeding, would arise as to whether or not there had been a failure of proof as to a particular state." The views of Division 5 were adopted by the full Commission. (41 M. C. C. p. 270).

There is no evidence of fraud or deception on the part of West Coast, and plaintiffs stated at the hearing that they made no claim of bad faith. We think the action of the Commission in refusing to reassign the proceeding to a joint board was proper.

2. Plaintiffs contend that the evidence does not support the order of the Commission. It is unnecessary to discuss the evidence. It is not for this court to find the facts and substitute its judgment for that of the Commission. The only question is whether there was any evidence on which to base the decision. The record shows ample and convincing evidence to support the finding of the Commission that the public interest would be served by permitting a competing carrier to operate in plaintiffs' territory.

3. Plaintiffs claim that the findings made by the Commission are insufficient to support the order granting the certificate. The language of the Commission objected to it as follows: "We find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of passengers and their baggage in the same vehicle with passengers, between San Francisco and Seattle over the following route: (describing it); that applicant is fit, willing, and able properly to perform such service; that a certificate authorizing it should be granted; and that in all other respects the application should be denied." Plaintiffs urge that this is the only language indicating a specific finding of fact, and that since it is nothing more than a general statement in the words of the statute it is not sufficient to support the order.

The quoted language conforms with section 207 of the Interstate Commerce Act which required such a finding. Besides, the report on reconsideration contains numerous preliminary findings on which the final conclusion is based. Section 14 of the Interstate Commerce Act provides that "whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made." No damages were awarded in this proceeding, and the Commission was therefore required to state only its conclusion. The Commission has adequately complied with the requirement of the statute.

4. Plaintiffs urge that to permit a competing carrier to enter their territory at a time when their activities are curtailed by wartime restrictions would deprive them of their constitutional rights under the Fifth Amendment.

The grant to plaintiffs of the privilege of operating a public utility was in no sense the grant of a monopoly. If a state of war did not exist, and the establishment of a competing line were determined to be in the public interest, no constitutional right of plaintiffs would be in-

vaded merely by permitting competition. Plaintiffs claim, however, that since their operations are now restricted by the Office of Defense Transportation and their services curtailed, it would be inequitable to permit competition. The restriction complained of is briefly as follows: General Order O. D. T. No. 11 directed carriers to "eliminate waste in operations and eliminate duplication of parallel services" etc., and required common carriers operating over the same or closely parallel routes to formulate a joint plan for the maximum use of equipment and facilities. Plaintiffs submitted a plan whereby the operations of Independent Stages would be suspended and the equipment of the subsidiary taken over by the parent company. The plan was accepted by the ODT and the suspension of Independent Stages ordered by that office in August of 1942. Plaintiffs have not suffered financial loss from the suspension, but on the contrary have increased their profits substantially during the joint operation. However, it seems immaterial whether plaintiffs have profited or suffered loss because of war conditions. There are few businesses which have not been affected by war regulation. A company whose output is curtailed by rationing obviously may not on that ground keep competitors out of its field. No more may plaintiffs; for after a valid determination that the public would be benefited by the operations of a competing carrier, the right of West Coast to operate is equal to plaintiffs' and subject to the same restrictions. We think that plaintiffs' constitutional rights will not be impaired by the issuance of the certificate.

5. Plaintiffs contend that since 1928, when the record before the Commission was closed, the war effort has caused radical changes affecting transportation, and that the Commission abused its discretion in refusing to reopen the proceeding and consider the application in the light of such changed conditions. Plaintiffs urge that the policies and orders of the Office of Defense Transportation and similar agencies constitute changes in the standards by which present or future public convenience and necessity are to be measured, and changes in factual conditions affecting transportation.

Plaintiffs strongly rely upon the decision of the Supreme Court in Atchison Etc. Ry. Co. v. U. S., 284 U. S. 248, an important case touching the structure of rates on export grain from the territory west of the Mississippi River and from Illinois. Here the inquiry related not to the fixing of rates but to the establishment of a competitive bus line. In the Atchison case the Supreme Court pointed out that a changed economic condition (the Depression of 1929-31) demanded reopening and a reconsideration. It held that, under the circumstances, the Commission abused its discretion in denying a rehearing.

In the present case the record was closed on October 5, 1938. Following various proceedings above enumerated, the full Commission on October 6, 1942, granted West Coast a certificate. In so doing it did not disregard, as the Commission in the Atchison case did, a radical supervening situation. The Commission took judicial notice that a state of war existed from December 8, 1941, between the United States and its enemies. This is shown by the dissenting opinion of Commissioner Mahaffie to the order of the full Commission, when he refers to changed conditions since the proceedings closed in 1938. Commissioner Mahaffie did not suggest that the proceeding be reopened to consider war conditions but that in view of such conditions the application for a certificate be denied.

On December 12, 1942, plaintiffs filed a petition for reopening and further hearing, based upon alleged changes in fares for passenger service and also upon changes in conditions occasioned by the war effort.

The Commission again considered wartime conditions. It had before it plaintiffs' petition for rehearing setting forth in detail the changes and plaintiffs' contentions as to the effect of such changes on the operations involved, and the answer of West Coast admitting the factual conditions alleged by plaintiffs and refuting plaintiffs speculations and predictions as to their effect.

It would be a useless act to reopen the proceeding, for it would not be possible to predict what will be the ruling of the various war agencies if West Coast is not permitted to proceed under its certificate. And as stated by counsel

for the Commission, if plaintiffs are right and West Coast will not be permitted to operate, plaintiffs are not damaged because they will not have the competition they are attempting to prevent. If plaintiffs are wrong and these operations will be made possible by the war agencies, presumably it will be because the war effort and the public will be benfited by the operation.

The decision in the Atchison case, supra, is not to be extended to require a rehearing in every case, rate or otherwise, for changed conditions; and "the rule announced, while intended to safeguard substantial rights, may not be invoked where its application would disenable the Commission to protect the interest of the public." U. S. v. Northern Pacific Ry., 288 U. S. 490, 494. We think that the Commission protected the interest of the public in granting the certificate for the competing bus service.

There is no showing that the Commission abused its discretion by failing to formally reopen the proceeding and receive evidence of facts of which it had taken judicial notice. The Commission decided that either despite changed conditions or because of them the public convenience and necessity required the additional service which West Coast proposed to furnish.

Where there is no abuse of discretion this Court will not attempt to substitute its judgment as to whether or not the certificate should have been granted. This is a matter peculiarly within the province of the Commission and one which it is best equipped to determine.

The temporary injunction heretofore issued will be vacated; the suit will be dismissed with costs to defendant and interveners; counsel for defendant may submit findings of fact and conclusions of law in conformity with Rule 52(a) of the Rules of Civil Procedure.

March 2, 1944.

(Endorsed:) Filed Jun. 10, 1944.

JUL 20 19

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 275

NORTH COAST TRANSPORTATION COMPANY (a corporation) and INDEPENDENT STAGES, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WEST COAST BUS LINES, LTD., et al.,

Appellees.

APPELLANTS' REPLY TO MOTIONS TO AFFIRM IN APPEAL FROM SECOND "FINAL" DECREE.

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In the Supreme Court
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NORTH COAST TRANSPORTATION COMPANY (a corporation) and INDEPENDENT STAGES, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WEST COAST BUS LINES, LTD., et al.,

Appellees.

APPELLANTS' REPLY TO MOTIONS TO AFFIRM IN APPEAL FROM SECOND "FINAL" DECREE.

STATEMENT OF THE CASE.

This is an appeal from a second decree, designated by its terms as a "final decree", made by a specially constituted District Court for the Northern District of California on May 9, 1944, dismissing a petition for

annulment of an order of the Interstate Commerce Commission.

The suit was brought by North Coast Transportation Company and Independent Stages, Inc., to enjoin, set aside and annul an order of the Interstate Commerce Commission made on October 6, 1942, so far as such order grants to West Coast Bus Lines, Ltd., a certificate of public convenience and necessity to operate as a common carrier of passengers between Portland, Oregon, and Seattle, Washington. As alleged in the complaint and admitted by the answers, there is no relationship between the plaintiffs and any carrier operating south of Portland, and the Portland-Seattle services and the carriers operating there are wholly separate and distinct from the Portland-San Francisco carriers and their operations.

The application of West Coast Bus Lines, Ltd., was filed with the Interstate Commerce Commission on April 19, 1938, stating that it proposed to operate a bus line between Phoenix, Arizona, and Seattle, Washington, over a route extending through Los Angeles, San Francisco and Portland. The hearing was held before Examiner Croft during the periods from August 1 to August 20, 1938, and from September 26 to October 5, 1938. North Coast Transportation Company and Independent Stages, Inc., appellants here, intervened in the proceeding as protestants. On or about August 2, 1940, a proposed report and order by Examiner Schweickhardt was issued, recommending that a certificate be granted to West Coast Bus Lines, Ltd., authorizing operations between San Fran-

cisco and Seattle. On March 9, 1942, Division 5 of the Commission, one of the three Commissioners dissenting, issued a report and order reversing the Examiner and denying the certificate. On October 6, 1942, the full Commission, four of the ten participating Commissioners dissenting, issued its report and order reversing Division 5 and granting a certificate to operate between San Francisco and Seattle. The two decisions are reported in 32 MCC 619 and 41 MCC 269. The complaint seeking annulment of the Commission's order was filed March 15, 1943.

PROCEDURAL HISTORY AND STATUS OF MOTIONS TO AFFIRM.

Owing to the circumstance that two decrees have on different dates been entered by the District Court dismissing the action, we should preliminarily acquaint the Court with the procedural history of the case and the relation thereto of the motions to affirm. This will explain the necessity for the two appeals on file in this case.

A decree in the form of a final order dismissing the suit was entered by the District Court on February 29, 1944. An appeal was taken from this order and was allowed on April 18, 1944. The decision rendered by the Court in connection with this dismissal of the action is reported in 54 Fed. Supp. 448.

On May 9, 1944, the Court entered a second decree which in terms also dismissed the action. Findings of fact and conclusions of law were made and filed on

the same date. An appeal was likewise taken from the second decree and was allowed on June 10, 1944.

A motion to affirm was filed by the United States and Interstate Commerce Commission in connection with the appeal from the first decree. Appellants' reply to this motion is on file.

As to the second appeal, a motion to affirm has been filed by appellee West Coast Bus Lines, Ltd., and this motion has been joined in by appellees National Trailways System, Burlington Transportation Company and Santa Fe Trail Transportation Company. The United States and the Interstate Commerce Commission filed a separate motion to affirm, and have also joined in the motion to affirm filed by West Coast Bus Lines, Ltd.

It is contended in the motion to affirm filed by West Coast (page 2) and joined in by the other appellees that the decree of February 29, 1944, does not represent a final and appealable order. Conversely, the United States and the Interstate Commerce Commission state in their motion (page 2) that the second decree represents the same action by the District Court as the first decree. As we have stated, they have filed a motion to affirm the first decree. It need only be observed in this connection that since the decree of February 29, 1944, dismissed the suit it was manifestly a final and appealable order and appellants were required to appeal therefrom if they sought a review by the Supreme Court. The appellants were likewise under the necessity of appealing from the second decree since the question as to which of the two decrees

will be considered as controlling could not be determined by appellants in advance of consideration of the question by the Supreme Court. Presumptively, this Court will determine which of the two appeals is to be taken under consideration.

THE PRINCIPAL GROUNDS OF APPEAL.

In essence these two motions to affirm, like the one filed on behalf of the United States and the Interstate Commerce Commission upon the first appeal, are based on the grounds that the appellants, North Coast Transportation Company and Independent Stages, Inc., do not have such an interest in this proceeding as to entitle them to be heard and that the appeal presents no substantial questions to be considered by the Court, and that therefore the Court should not consider this appeal on its merits.

Not only do the appellants have a most vital interest in this proceeding, but the provisions of the Motor Carrier Act expressly recognize an interest such as that of these appellants and accord the right to appeal from orders of the Commission where such an interest is involved.

49 USCA 1 (20) and 305(g);
Alton Railroad Co. v. U. S., 315 U. S. 15, 19.

The questions presented on this appeal are of a most fundamental and substantial character. We are certain that this will become readily apparent in the presentation to follow.

The three principal grounds upon which the appellants rely may be stated in summary form as follows:

1. The report and order of the Commission and the inferences or statements in the report upon which the order was based (and which will here be regarded as "findings") are not supported by any substantial evidence, and are, in fact, contrary to the evidence.

2. It was not the intent of West Coast Bus Lines, Ltd., either at the time of the hearing or at the time of filing the application, or at any other time, to serve more than three states and it was, therefore, mandatory under the provisions of Section 205 of the Motor Carrier Act (49 USCA 305) to refer the matter for hearing and primary decision to a joint board of the three states in which alone the applicant sought to operate.

3. Owing to the unprecedented and radical changes in conditions between the time of the hearing in 1938 and the final decision in 1942, the Commission should have granted a further hearing for which appropriate application was made, and the failure to reopen the proceeding was a denial of the right to a fair hearing, particularly in view of the fact that the Office of Defense Transportation had in the meantime, in conformity with the national policy to eliminate and curtail all unnecessary duplications in service, and prior to the final decision of the Commission,

required curtailment of the bus services rendered by the plaintiffs herein.

We shall briefly discuss each of these three grounds in turn.

Before passing to the discussion of these issues we may note the assertion in the motion of West Coast (page 6) that there are too many assignments of error in the appeal. The Court will find, however, that each of the assignments is predicated on a substantial ground, that the assignments are definite and specific and that they fully apprise the Court and the appellees of the grounds for the appeal.

I. THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S REPORT AND ORDER AND THEY ARE IN FACT CONTRARY TO THE EVIDENCE.

Foreword.

Although an analysis of the evidence to support the assignments of error that the Commission's findings are not supported by the evidence is not required in connection with a reply to a motion to affirm, we deem it appropriate to direct attention to some of the more serious errors in the Commission's report, at least to the extent that such analysis is responsive to statements made in the motions to affirm.

The underlying premise of the Commission's decision granting a certificate to West Coast is that the existing bus services between San Francisco and Seattle were deficient because of (1) insufficient schedules, (2) overcrowding, (3) improper equip-

ment and (4) employee discourtesy (pp. 279-285), that since these indicated deficiencies "have not been explained" (p. 290) by the existing carriers, the Commission was "justified in the conclusion that they" were "in part, at least, attributable to the past lack of effective competition" (p. 290) and that, therefore, public convenience and necessity required the establishment of the operations proposed by the applicant, West Coast Bus Lines, Ltd. The error of the Commission is that there is no basis whatever in fact or in the evidence for any statement or inference that there were any such deficiencies in the bus service north of Portland, the only portion of the proposed route involved in this appeal. The evidence is wholly to the contrary. As will soon be observed, the errors are for the most part due to failure to distinguish between testimony relating to operations north of Portland from that relating solely to the route of the applicant's proposed service south of that city. The errors are numerous and of a most serious and fundamental character.

It should be understood throughout that only that portion of the certificate relating to the route north of Portland, Oregon, is under attack.

While the assignment of errors also raises the question as to the sufficiency of the Commission's findings to support its order, and while the Commission's report is, we feel, wanting in that respect, we shall treat every inference or statement and every reference to testimony as if they were actual statements or findings on the part of the Commission, and

shall, accordingly, consider them as representing actual "findings" on which the decision and order were based.

The existing transportation services between Portland and Seattle and the operations proposed by West Coast.

We shall, in the discussion to follow, first offer a brief description of the existing bus operations (speaking as of the time of the hearing in 1938) and the operation proposed by the applicant.

North Coast was operating 15 schedules daily each way between Portland and Seattle. These schedules were spaced one hour apart during the greater part of the day. Three so-called "Limiteds" were operated. These stopped only at the larger communities intermediate between Seattle and Portland. Operating times ranged from 5 hours and 15 minutes for the Limiteds to from 6 hours and 5 minutes to 6 hours and 30 minutes for the regular schedules. The route is 196 miles in length and passes through the cities of Kelso, Chehalis, Olympia and Tacoma, Washington, and numerous other communities in that state. There are no stations on this line in the state of Oregon other than Portland, and no Oregon intrastate passengers are transported on this route.

(West Coast proposed to operate two round trip schedules daily over the same route. Its proposed running times were 6 hours 05 minutes and 6 hours 10 minutes.)

North Coast regularly maintained the hourly service between Portland and Seattle, although a large num-

ber of the schedules were being operated at a loss for the greater part of the year. Many of the schedules were operated at a loss the year round, and this was true, for example, as to five of the fifteen southbound schedules from Seattle to Portland. Some of the runs earned barely one-half their operating expense. The hourly schedules, however, were being continuously maintained by North Coast because of the convenience to the public that is inherent in regularity and dependability of service, not only for the local passengers of North Coast but also for passengers interchanged with connecting lines. Sixteen bus lines connected with North Coast in Washington.

North Coast also operated a number of local schedules between Seattle and Portland on the one hand and intermediate points on the other, in addition to the 15 through schedules between those two terminals. At the time of the hearing before the Commission, it was operating in all 23 round trip schedules between Seattle and Tacoma. These schedules were spaced thirty minutes apart during daytime hours.

Less than 15% of the passengers transported by North Coast are interstate passengers, and the intrastate traffic has been continually increasing in relation to the long haul or interstate traffic.

The average operating cost to North Coast was about 24¢ per bus-mile and, since the average passenger fare was in the neighborhood of 1.5¢ per mile, it was necessary to have an average load of approximately 16 passengers to meet the operating expenses.

But, as already indicated, on a large number of schedules the volume of traffic was far below the minimum number of passengers required to meet the operating costs. The average load-factor (percentage of occupancy of available seats) for the system as a whole between Portland and Seattle was approximately 50% for the year 1937 and the first seven months of 1938 up to and including the last month prior to the hearing. The average seating capacity of the buses was 32.4 and the average occupancy approximately 16.2 passengers.

(West Coast proposed to operate with 25-passenger buses, the operating cost of which it estimated at 15.36¢ per bus-mile.)

The service of North Coast was always protected by stand-by equipment to provide for overloads or car failure anywhere along the route. The largest reservoir of equipment is stationed at Seattle and the next largest at Portland. Requisite number of extra buses are also held at Olympia, Tacoma, Chehalis and Kelso. Extra drivers are likewise maintained at all these points. The maximum time required to reach any point with a relief car would be one hour. This would be between Kelso and Portland where the maximum distance from a relief station is 27 miles. At the remaining sections of the route the maximum distance from relief stations is from 15 to 20 miles.

(West Coast proposed to maintain relief cars only at Portland and Seattle. The maximum distance from a relief station would accordingly be 98 miles, and

the maximum time for arrival of a relief car, 3 hours.)

North Coast buses use the union stage terminal at Seattle, which is also used by practically all the bus lines that operate out of that city. At Portland it likewise uses the union bus depot, which is similarly used by other bus lines serving Portland. It maintains or leases terminal facilities at other points along its route, the largest ones being at Olympia, Tacoma, Chehalis and Kelso. These depots, too, are used by all the local bus lines for the convenient interchanging of passengers with North Coast.

(West Coast did not propose to use any of these jointly used terminals but intended to establish terminals of its own.)

There are three railroad lines between Portland and Seattle, namely, the Union Pacific, the Great Northern, and the Northern Pacific. The rail lines generally follow the same route as the highway and serve Tacoma, Chehalis, Kelso and Vancouver, as does North Coast. These railroad lines, however, do not operate passenger services in competition with one another, but have for many years been permitted to render a so-called "pooled" service under authority granted by the Interstate Commerce Commission.

Puget Sound-Portland Joint Passenger Train Service, 96 I.C.C. 116 (1925); 128 I.C.C. 149 (1927).

Under the authorized arrangement the three railroad lines run four pooled schedules each way between these two terminals. The running times range from

5 hours to 7 hours, as compared with 5 hours and 15 minutes to 6 hours and 30 minutes for North Coast, and the proposed schedules of 6 hours and 5 minutes and 6 hours and 10 minutes of West Coast. The railroad fares between Portland and Seattle ranged from $2.50 one way and $4.00 round trip for coaches to $5.48 and $8.25 first-class, as compared with $2.50 and $4.00 for North Coast, $2.00 and $3.50 for Independent Stages, and proposed fares of $2.45 and $4.45 for West Coast, the West Coast one-way fares being 5¢ less and round-trip fares 45¢ higher than those of North Coast and 45¢ and 95¢ higher, respectively, than those of Independent Stages. Independent Stages operated two round trip schedules, the same as proposed by West Coast.

The railroad lines afford a very effective competition. During the month of October, 1937, for example, a total of 45,818 passengers was transported in rail services on the schedules as the trains left and arrived at Portland, as compared with 18,780 passengers transported by North Coast during the same month.

There were five air line schedules in operation between Portland and Seattle at the time of the hearing in 1938. The fares and number of passengers carried are, however, not shown of record.

We believe that the foregoing description will suffice to afford a general view of the existing transportation services and operations proposed to be inaugurated by West Coast.

Discussion of the basic errors of the Commission.

Since the Commission's report is based on statements or inferences to the effect that the schedules of existing bus lines were insufficient, that the buses were overcrowded, that the equipment was inadequate, and that there was employee discourtesy, we deem it necessary to point out the error of the Commission in "finding" that any such deficiencies existed as to the service north of Portland. As we have stated heretofore none of these "findings" are supported by the evidence and they are wholly contrary to the evidence. The errors result mostly from the fact that the report repeatedly treats testimony relating only to the route or service south of Portland as if it also applied to the route or service between Portland and Seattle.

We shall discuss first the "finding" of insufficiency of schedules and overcrowding.

Quite early in its report (p. 279) the Commission states under the heading "Traffic Surveys and Public Witness Testimony" that in order to determine the public need and desire for applicant's proposed service, applicant's president, prior to the filing of the instant application, made an investigation of the proposed route from San Francisco to Seattle and that these surveys "indicated a need for and a public attitude in favor" of the service. The evidence, however, shows that no such investigation was ever made as to any point in Washington or Oregon, either by the president of West Coast or anyone else. No one from West Coast came to any point in Washington until

about two weeks before the hearing in August, 1938, four months after the application was filed, and the purpose of that visit was, not to investigate the need for service for the purpose of filing the application, but only to solicit witnesses to testify for the applicant.

Still speaking under the same heading (pp. 279-283), the Commission's report refers to the testimony of what it terms "public witnesses" in manner to indicate that such testimony had reference to the route or the services between Portland and Seattle, when again the evidence shows conclusively that not a single witness of this type was secured by West Coast, although it intensively solicited such support and in connection with such solicitation made the most flagrant misrepresentations as to the existing service and as to public support it had secured in favor of its proposed operations. Not only did West Coast not obtain the support of any public organization, but the Chambers of Commerce of Seattle, Olympia, Tacoma, Chehalis and Portland all appeared in protest to its application and all such appearances were wholly without solicitation on the part of plaintiffs herein. Similarly, all the 16 bus operators connecting with North Coast were represented at the hearing in unanimous protest against the application. Not a single bus line anywhere appeared in support of the application.

In this connection, the Commission also refers to the testimony (p. 283) of the owner of a commercial travel bureau or ticket selling agency operating in

Seattle and Portland as giving evidence in support of the applicant. His testimony, however, does not relate a single fact that indicates any insufficiency of schedules or overcrowding or any need for any additional services. But he testified that he favored competition. Nor did any other witness produced by West Coast give any different testimony showing need for additional services. On the other hand, some 25 or more witnesses who used the bus services, many of them very frequently, testified unreservedly as to the sufficiency of the services that were available.

We may appropriately quote the following language from the decision of Division 5 of the Commission, which denied the application sought by West Coast:

> "The number of civic bodies and persons of some official capacity who supported protestants is significant. Were the present services genuinely inadequate in amount or deficient in quality sufficiently to justify a grant of authority for a new operation, this kind of support for protestants would hardly be present." (32 MCC 634.)

This comment is wholly in accord with the evidence of record.

The error of the "finding" that there was overcrowding of buses, and that therefore the schedules were insufficient in number, results wholly from confusing the operations between Portland and Seattle with those on other portions of the route proposed to be served by West Coast. We shall explain just how

this error occurred. The Commission's report first points out that the bus lines operating south of Portland had taken their load counts at a station near the California-Oregon state line, that this was a point of very low traffic density because it lies approximately half way between and far from the metropolitan terminals of the route, and that in addition the intrastate passengers were not included in the count. The report then makes the following statement (p. 282):

> *"North Coast's figures, based on checks at the Oregon-Washington State line, like those of Pacific Greyhound and Dollar Lines, do not include any intrastate passengers and are misleading for the same reason."* (Italics supplied.)

The serious error the Commission made is at once apparent. The load counts of North Coast, as the evidence shows incontrovertibly, were taken at Portland, Oregon, the southern terminus of its route and therefore at a point where the traffic density was high and not low. This count also represented the traffic at the Oregon-Washington State line for the simple reason that the state line is immediately adjacent to the City of Portland, and all the passengers on the buses as they left or arrived at Portland also crossed the state line because there were no bus stations between the city and the state line. And, for that reason also, the buses did not contain any intrastate passengers. Hence there were no intrastate passengers to be counted. The counts included all the passengers and they were all interstate passengers. None were omitted.

The first station on the North Coast route north of Portland is Vancouver, Washington, only 8 miles from the Portland bus terminal. Obviously the count at Portland, a point of high traffic density, cannot be assimilated to one taken at the state line between California and Oregon, a point of low traffic density on the route between San Francisco and Portland, and having no relation whatever to the operations north of Portland. Yet it is upon this obvious and grievous error that the Commission's report bases its inference that North Coast buses were overcrowded and that therefore its schedules were insufficient. It is manifest that the error is one that relates to a basic and essential factor underlying the ultimate conclusion of the Commission with respect to the existing service and public need for the service proposed by West Coast north of Portland, irrespective as to what the situation may have been south of Portland, which is not involved here.

It should, moreover, be added that the low point of traffic density of North Coast is reached at Chehalis, Washington, 99 miles north of Portland. As we have stated, the load count was not taken at the intermediate point, but was taken at Portland, a point of high traffic density.

The average load-factor as the buses arrived or departed from Portland in the traffic checks made by North Coast and presented in evidence was 47.2 for the year 1937 and the first 7 months of 1938. The buses had an average of only 15.3 passengers, and 17.1 empty seats, for the average capacity of 32.4 passengers as checked at Portland on the buses in actual

operation, on the runs as the cars left or arrived at Portland. The evidence also shows that for the route as a whole the average load-factor would be approximately 50%, or slightly higher than at Portland.

It should also be noted that owing to the fact that West Coast would have only an interstate certificate and the further fact that the interstate traffic drops constantly as the distance from Portland increases, West Coast would require loads of 18 passengers at Portland in its 25-passenger buses, in order to meet its estimated cost of 15.36¢ per bus-mile. This compares with an average load of 16.2 passengers for North Coast in its buses ranging from 29 to 37 passenger capacity, or an average of 32.4 seats for the buses in actual operation in 1937 and 1938.

It is manifest from this, not only that the North Coast buses were not overcrowded, but that, since West Coast buses would be required to be loaded far more heavily in relation to seating capacity than North Coast in order merely to meet its own estimated operating cost, there can manifestly be no basis for a contention that the proposed operation was required by public convenience and necessity to relieve overcrowding in connection with the existing bus services. The error, of course, lies in the inferences or statements in the report to the effect that the cars were over-crowded in connection with the existing bus services.

We should at this point also discuss certain statements contained in the Commission's report with regard to the operations of Independent Stages.

On pages 274 to 275 the Commission's report refers to the second-class service operated between San Francisco and Portland and states that "no effort is made to protect overloads by the operation of second sections", and then states that Independent Stages operated its service "in much the same manner". This statement is again without record support and contrary to the evidence. The evidence clearly shows that the service of Independent Stages was fully protected against overloads by stand-by equipment. The report merely fails to distinguish between evidence relating to the services north of Portland from those south of Portland.

A few pages later, the report states that as to the second-class services (again without distinguishing between services north and south of Portland) "the conclusion is warranted that insufficient schedules and crowding is intentional and calculated to discourage the use of the cheaper services and to compel the use of the affiliated higher-priced service". (p. 282.) Still later the report states that the overloading "reflects a managerial policy". (p. 284.)

These and other statements or inferences of similar import are all wholly contrary to the evidence so far as the services north of Portland are concerned. They are all based upon the erroneous assumption that there was any overcrowding or insufficient schedules as to the services of the appellants here.

Still speaking, in part, with respect to Independent Stages, the Commission states (p. 278) in its report:

> "Both Pacific Greyhound and North Coast have admitted that their affiliated Dollar Line and Independent Stages operations are and have been maintained solely as fighting ships wherewith to meet and discourage competition, this notwithstanding the fact that Dollar Line was acquired as late as August 1935 after Federal regulation of motor carriers, though not yet effective, was assured."

Operations of Independent Stages were never admitted to represent a "fighting ship", particularly not in the sense in which the Commission uses that term. The record in this proceeding fully depicts the deplorable conditions which necessitated the inauguration of the service. They are, however, not mentioned in the Commission's report. In view of the Commission's comment with respect to Independent Stages, and its failure to state the circumstances which led to the establishment of its operations, we desire briefly to relate them here.

The operations of Independent Stages were inaugurated some five years prior to the enactment of the Motor Carrier Act in 1935, empowering the Interstate Commerce Commission to regulate motor carriers in interstate commerce. The operations were commenced as a protective measure, under conditions which were at the time prevalent throughout the country and which are quite fully described by the Interstate Commerce Commission in two investigations conducted by it prior to the enactment of the Motor Carriers Act. *Motor Bus and Motor Truck*

Operation, 140 I.C.C. 685, decided April 10, 1928, and *Coordination of Motor Transportation,* 182 I.C.C. 263, decided April 6, 1932.

The Commission states in the first of these two reports that prior to 1926 the states generally had assumed control over the operations of motor buses and motor trucks engaged in interstate operations and that the operators were required to conform to the laws and regulations of the states in which they operated. It states further that following the decision of the Supreme Court in *Kuykendall v. Buck,* 267 U.S. 307, holding that the states were without power to regulate interstate operators, no regulation had been exercised over them and as a result a large number of new and unregulated interstate operations had sprung up throughout the country. The report states, among other things, that many of the operators were of the so-called "wildcat" and "fly-by-night" character, that financial irresponsibility had become a serious problem, that passengers were frequently stranded without recourse, that there was a tendency to "break down wages and conditions of employment in the transportation industry", and that many complaints were being received by the Commission with respect to the situation.

The record here shows that conditions were no different between Seattle and Portland from those described in the two reports of the Commission. Passengers were being left stranded and North Coast frequently sent out buses to pick them up and take them to their destination. There were, during a period

of a few years, as many as 14 bus operators between Seattle and Portland, all without regulation. In one instance, one of the operators came to the office of the Traffic Manager of North Coast and demanded the payment of $20,000 to stop his operations and, upon being advised that no payment of any amount would be made, he exhibited a tariff he had prepared, naming a fare of $1.00 between Seattle and Portland, which he stated he intended to put into effect if his demand were not met. North Coast reported the matter to the Department of Public Works of the State of Washington, the state regulatory authority, and upon being told that the Department was without power to act, North Coast requested approval of the establishment of a second-class service with fares somewhat lower than those maintained by North Coast, in order to protect the North Coast service against operators of this character. The proposal received the approval of the Department and the second-class service was thereupon established and operated by Independent Stages, Inc., a wholly owned subsidiary of North Coast. The operations did not represent a "fighting line", since that term assumes that the operator has taken the initiative, whereas the service of Independent Stages was inaugurated solely as a protective measure under conditions for which the most nefarious practices of unregulated operators were wholly responsible. This situation is, moreover, fully recognized by the Commission itself in *Benjamin Franklin Line, Inc., Common Carrier Application,* 14 MCC 513, decided May 19, 1939,

some seven months after the hearing in the proceeding now under review.

On page 281 the Commission's report also states that the equipment used by Independent Stages was described by one witness as "nothing but old dilapidated street car buses". The fact again is and the evidence shows that the bus which this witness had ridden and which he thought was being operated by Independent Stages was not operated by that bus line. No bus of that type was ever operated by Independent Stages. As has been observed, there were at times many other bus operators between Portland and Seattle aside from North Coast and Independent Stages, and the evidence shows that even at the time of the hearing there was still an uncertificated bus operator running buses between those points. Presumptively, the bus described by this witness was being used by that operator.

With further reference to the buses of Independent Stages, the Commission's report states that there was testimony that the Independent buses were "unpleasant with fumes". (p. 281.) There was one witness who upon direct examination by counsel for West Coast gave such testimony but admitted upon cross-examination that she was mistaken and that the testimony she had given had reference to the portion of her trip south of Portland. A little later another witness was called by West Coast who had accompanied her on this very trip and this witness immediately volunteered the statement that the experience of the prior witness with respect to the unpleasant

fumes had occurred in the mountains some 200 miles south of Portland, and not north of Portland as the testimony of her companion as elicited by West Coast had at first indicated.

Independent Stages operated its service with buses retired by North Coast. The equipment was not new, and the service was a low-fare service and manifestly not of the same quality as that of North Coast. But there was no overcrowding or insufficiency of schedules. The service was fully protected by stand-by equipment, as clearly shown by the evidence.

With respect to the North Coast bus equipment, the Commission's report refers to the buses as being "double-decked part way" (p. 274) and later makes the following statement (p. 280):

> "Though a number of applicant's public witnesses expressed dissatisfaction therewith and criticized it in several respects, we are not impressed that that used by Pacific Greyhound is open to serious criticism. *It is very doubtful whether as much can be said for the 'double-deck' equipment used by North Coast.*" (Italics supplied.)

To what extent the statement that "it is very doubtful whether as much can be said for the * * * equipment used by North Coast" might be considered a finding we need not discuss, but we should point out that the equipment is not "double-deck" as stated in the report.

The buses operated by North Coast are known as the "Observation" type. The passenger compartment

is divided into a forward and a rear section, the latter seating 25 passengers and the forward section 11 passengers. The two sections are separated by three 8-inch steps. There is no double-decking of passengers as the report of the Commission would appear to indicate. The floor of the forward section is but one step from the ground, while the floor of the rear section is the same height from the ground as the floors of buses of similar passenger capacity but with single level floors. The engines of the buses operated by North Coast are of the horizontal or "pancake" type and are placed under the floor of the rear sections of the buses.

North Coast had in all 89 buses, 69 of which, ranging in capacity from 29 to 37 passengers, were of the type used for service between Seattle and Portland, the most recently acquired being represented by 10 buses of 36-passenger capacity delivered in the summer of 1938. Fifteen buses of the same kind were to be secured in 1939. It was the practice to retire the equipment after five years of service, and most of the cars in operation were less than three years old.

Since the adequacy of North Coast equipment is at least inferentially questioned by the Commission, and since a point is made of this "finding" in the West Coast motion to affirm, we present herewith a comparative and self-illustrative description of the North Coast buses and of the type of bus West Coast proposed to operate.

Description of Buses.

	North Coast	West Coast
Seating Capacity	36	25
Weight (without load)	20,000 lbs.	12,435 lbs.
Size of Tires	10:50 x 20	9:00 x 20
Horsepower of Motor	211	86
Position of Motor	Horizontal type; under floor of rear section of bus.	Inside front end of bus.
Frame	Light weight Corten steel.	Ordinary steel.
Cost of Bus	$16,200	$7,638
Cost per seat or passenger carrying capacity unit	$450	$305
Length of bus	35 ft.	27 ft. 8 in.
Width	8 ft.	7 ft. 11½ in.
Height, outside	Front section: 7 ft. 11 in. Rear section: 9 ft. 11 in.	9 ft. 7½ in.
Height, inside, center	75 in.	78 in.
Floor plan	Divided level. Rear section 24 in. higher than forward. Separated by three 8-in. steps. Forward section, 11 seats. Rear, 25. Floor of forward section one step from ground.	Single level, sloping forward.
Number of seats behind rear axle	None	8
Width of Seats	36 in.	35 in.
Spacing of Seats	36 in.	35 in.
Aisles	14 in.	14 in.
Upholstery	Mohair	Mohair
Adjustability of Seats	To several positions.	To two positions.
Foot Rests	Adjustable.	Not adjustable.
Heat and Ventilation	Filtered air. Multiple heating and ventilating units.	Air non-filtered. Single heating and ventilating unit.

It will be noted that the North Coast bus weighs 20,000 lbs. and costs $16,200, or $450 per seat or passenger carrying unit, as compared with a weight of 12,435 lbs. of the West Coast bus, costing $7,638, or $305 per seat or passenger carrying unit. It should be observed that on the item of depreciation alone the added expense of a 25-passenger bus costing $450 per seating unit as that of North Coast would be .803¢ greater per bus-mile than for one costing but $305 per unit, the cost of the bus West Coast proposed to use. This difference in operating cost alone would almost entirely cancel out the estimated net earnings of .848¢ a bus-mile as presented by West Coast in support of its claim of financial feasibility of its proposed operations.

It should be observed still further that the evidence shows that the light weight, low-powered bus, with front-end engine inside the body has long been obsolete for long haul inter-city bus operation; that a representative of the manufacturer of the chassis admitted that the route between San Francisco and Seattle was "tougher" than any of the few routes (all in the central and eastern part of the United States) where some of these chassis were used; and the prospective builder of the body had never built an inter-city bus body and admitted upon cross-examination that the body proposed to be used by West Coast was not suitable for inter-city transportation.

Certainly, the granting of a certificate for the proposed operation of such a bus cannot be based upon

the ground of "inadequacy of equipment" of the existing service.

We turn next to the question of "employee discourtesy". We first quote the following from the Commission's report (p. 285):

> *"Employee courtesy and considerate handling.* Applicant's public witness testimony is replete with instances of employee discourtesy and inconsiderate and indifferent treatment of passengers, some of them extremely aggravated. * * *. A resident of Ashland, Oreg., traveling to San Francisco over Greyhound the day before he testified, on arrival late at night found that his baggage had apparently been put off in Oakland. Notwithstanding, Greyhound employees indifferently refused to do anything about it until the next day. At the time of his testifying he did not yet know whether his baggage had been located in Oakland or elsewhere. Several instances of passengers being left behind at meal stops were described. In one instance other passengers told the Dollar Lines' driver that he had left two passengers behind but he refused to stop or check up. Later the passengers overtook the bus in a private car but the driver's attitude remained such that other passengers became resentful and 'he really had to apologize'.
>
> If the evidence of employee indifference to the public were not so pronounced we should be inclined to give it but little weight for we are not unmindful of the fact that some employee lapses are bound to occur and that the expectations of some passengers are bound to be unreasonable. In the circumstances, however, we are convinced

that the carriers now operating are not giving the public the thoughtful consideration which is reasonably to be expected and could be expected with effective competition in the field."

Here again the record contains no evidence as to any employee discourtesy in connection with any of the services north of Portland. West Coast, however, did produce a witness who testified that at one time when he was late to catch a bus about a year previously he had rushed up to a uniformed attendant at the union bus station in Seattle and asked him whether certain buses standing at the platform where the North Coast buses usually stopped were Portland buses, and that the attendant had replied "Can't you read?". The witness could not state whether the attendant was an employee or driver of North Coast, but stated he assumed that he was, since he was standing near the place where the North Coast buses received and discharged passengers, although some eight or ten other bus companies used the same terminal. This is the sum total of evidence of "employee discourtesy" with respect to either North Coast or Independent Stages.

It would appear quite manifest that this testimony could hardly be regarded as supplying substantial evidence in support of a claim of employee discourtesy, or as furnishing a reasonable ground for the granting of a certificate of public convenience and necessity for the inauguration of a new and additional service.

On the other hand, the evidence shows affirmatively that the bus operators were selected with great care and only operators of high qualifications and experience, either gained prior to employment by North Coast or through preliminary training by that company, were employed. The operators are all members of the bus drivers' union. (Incidentally, wages paid to North Coast drivers representing an expense of 4.91¢ per bus-mile, as compared with the estimated bus driver expense of 3.18¢ per bus-mile with the under-cutting wage rates under which West Coast proposed to operate.)

Not only is there no evidence of any employee discourtesy in the services north of Portland, but witness after witness who used the service testified to the unfailing courtesy of the bus drivers. We quote a few excerpts from the testimony:

> "A. They (the drivers) were extremely courteous. The reason I noticed that was because one lady passenger had a broken arm on the bus and she was shown every consideration." (*W. L. Floyd.*)

> "Q. What have you to say with respect to the treatment accorded you by the drivers?
> A. Well, I think it was superior to any other bus I have ever been on." (*Miss LaVerna Adkins.*)

> "A. * * * The bus drivers were very congenial and make your trip as enjoyable as possible. The comfort of the buses—it was almost unbelievable to think that you could ride so comfortable, both on the cruiser and the North

Coast Lines. There is just nothing that I could suggest that would add to the comfort." (*Mrs. Jackie Macfarlane.*)

"A. I found that the drivers were very courteous, and if anyone was sick on the bus they stopped and took care of them and anytime it was necessary they stopped. They even came back in the bus and asked if everybody was all right, if everything was all right before we started out on the trip. The buses were very comfortable." (*Miss Claire Wyman.*)

"A. Well, the service was very satisfactory. The drivers are perfectly courteous and always very kind. I had the experience of taking sick and I had to go to a hotel. I got off at Chehalis to go to a hotel and that driver was particularly nice. He took me up and registered for me and called a doctor.

* * * * * * *

A. They are always very courteous. The stages are comfortable and there are lots of schedules. I always thought the service was very splendid." (*Mrs. L. Gale Barett.*)

"A. Very satisfactory. I often wondered if it could be improved on. The drivers are courteous and efficient and very careful for your welfare." (*Mrs. L. Sandry.*)

"A. Well, I have always found the drivers to be very courteous and very anxious for the comfort of the passengers, and especially on this last summer's trip there was so much courtesy shown to older people who were traveling off and on the buses, and they are very careful drivers. I have always experienced that, and the

comfort is improved each year. Every summer I find some improvement in the buses and their comfort for the passengers." (*Miss Nora Ashton.*)

The error in the Commission's report with respect to the matter of employee discourtesy is again due to failure to distinguish between the testimony relating to services north and south of Portland. We believe the foregoing discussion will suffice on the question of lack of factual or evidentiary support of the Commission's "findings" as to deficiencies in the existing bus service between Portland and Seattle. There are numerous other serious errors of a basic and essential character in the Commission's report in addition to those we have listed, but, as we have stated, we do not feel that it is necessary that the record before the Commission be completely analyzed for the purpose of this reply to the motion to affirm.

The foregoing is itself sufficient to show that none of the "deficiencies" on the basis of which the Commission "found" that an additional service was required were existent as to the services north of Portland. In brief, there was no "over-crowding" or "insufficient schedules", nor "inadequate equipment" or "employee discourtesy". The "findings" of the Commission are wholly in error and are not only not supported by the evidence but are completely contrary to it.

No extensive argument should be required to show that if there is no real or substantial evidence to support the "findings" of the Commission with re-

spect to the basic and essential elements upon which its order is based, the appeal presents a substantial question, and that the question is properly subject to review by this Court. We are aware of no decision or other authority to the contrary. None of the decisions cited in the motions to affirm supports the contrary view. In the only case cited in either of the motions, where under somewhat similar circumstances the right to appeal was questioned (*Chesapeake & Ohio Ry. Co. v. United States,* 283 U. S. 35), this Court fully recognized the right of appeal and the right to be heard. The facts were fully reviewed by the Court, and the Court found that "the facts stated in the report" on which the Commission had based its conclusions were "sustained by the evidence" and were "plainly sufficient to support the order". (p. 43.) Not only did the Court not hold that the questions as to whether the Commission's findings were supported by the evidence were not subject to review, but it examined the evidence and fully discussed its sufficiency as noted in the decision.

This Court has repeatedly reviewed orders of the Interstate Commerce Commission and other administrative tribunals in which certificates, permits, or licenses were granted or denied for the operation of transportation services or other businesses subject to regulations under the particular statutes involved.

Alton Railroad Company v. United States, 315 U. S. 15;

Carolina Freight Lines v. United States, 315 U. S. 475;

Howard Hall v. United States, 315 U. S. 495;
Federal Radio Commission v. Nelson Bros. B. & M. Co., 289 U. S. 266;
Chesapeake & Ohio Ry. Co. v. United States, 283 U. S. 35, *supra;*
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134.

As illustrative of the governing principle of law we deem it sufficient to quote the following from the decision in *Federal Radio Commission v. Nelson Bros. B. & M. Co., supra:*

> "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench

upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U.S. 452, 470, 54 L. ed. 280, 287, 30 S. Ct. 155; *Interstate Commerce Commission v. Union P. R. Co.*, 222 U.S. 541, 547, 548, 56 L. ed. 308, 311, 32 S. Ct. 108; *New England Divisions Case* (*Akron, C. & Y. R. Co. v. United States*), 261 U.S. 184, 203, 204, 67 L. ed. 605, 615, 43 S. Ct. 270; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 67 L. ed. 731, 43 S. Ct. 445; *Chicago Junction Case* (*Baltimore & O. R. Co. v. United States*), 264 U.S. 258, 263, 265, 68 L. ed. 667, 673, 674, 44 S. Ct. 317; *Silberschein v. United States*, 266 U.S. 221, 225, 69 L. ed. 256, 259, 45 S. Ct. 69; *Ma-King Products Co. v. Blair*, 271 U.S. 479, 483, 70 L. ed. 1046, 1048, 46 S. Ct. 544; *Federal Trade Commission v. Klesner*, 280 U.S. 19, 30, 74 L. ed. 138, 146, 50 S. Ct. 1, 68 A.L.R. 838; *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 442, 74 L. ed. 524, 535, 50 S. Ct. 220; *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 654, 75 L. ed. 1324, 1332, 51 S. Ct. 587, 79 A.L.R. 1191; *Crowell v. Benson*, 285 U.S. 22, 49, 50, 76 L. ed. 598, 611, 612, 52 S. Ct. 285." (pp. 275-277.)

As we have stated, this Court has always held that the "findings" as to the basic and essential factors on which an administrative order, such as that here involved, is based, must be supported by the evidence and where this is not the case the order is subject to the process of judicial review. We know of no case holding to the contrary.

II. IT WAS NOT THE INTENT OF WEST COAST BUS LINES, LTD., EITHER AT THE TIME OF THE HEARING OR AT THE TIME OF FILING THE APPLICATION, OR AT ANY OTHER TIME, TO SERVE MORE THAN THREE STATES AND IT WAS THEREFORE MANDATORY UNDER THE PROVISIONS OF SECTION 205 OF THE MOTOR CARRIER ACT (49 USCA 305) TO REFER THE MATTER FOR HEARING AND PRIMARY DECISION TO A JOINT BOARD OF THE THREE STATES IN WHICH ALONE THE APPLICANT SOUGHT TO OPERATE.

Owing to the fact that bus transportation is predominantly local, as distinguished from interstate, in character and owing to the further fact that the local state authorities are more familiar with the transportation needs and requirements in their respective states than the Interstate Commerce Commission, explicit provisions were written into the Motor Carrier Act to vest in the local authorities under so-called "joint boards" initial jurisdiction of proceedings for certificates of public convenience and necessity and over various other matters, such as mergers, transfers of property, rates and fares, whenever the routes or the matters involved embraced not more than three states. (49 USCA 303(2), 305(a) to (f).) The statute provides that in such instances the matter shall be referred to a joint board for hearing and decision, the decision being made subject to review by the Commission. These provisions were incorporated in the Act upon the Commission's own recommendation, based upon the grounds we have stated above. (*Motor Bus and Motor Truck Operation,* 140 I.C.C. 685, *supra,* and *Coordination of Motor Transportation,* 182 I.C.C. 263, *supra.*)

The application of West Coast Bus Lines, Ltd., involved in this proceeding, states that it proposed to operate a bus service between Phoenix, Arizona, and Seattle, Washington, over a route running through Los Angeles, San Francisco and Portland. The record before the Commission, however, shows incontrovertibly that it was never the intent of West Coast either at the time it filed its application or at any other time to secure a certificate or to operate bus services between San Francisco and Phoenix. We may in this connection point out initially that the president of West Coast, and its first and principal witness, testified that it was not its intent to present any evidence in support of a certificate between San Francisco and Phoenix. The evidence introduced by West Coast at the hearing shows conclusively that no such certificate was sought and that none could possibly be expected to be granted upon the record as made. Accordingly, when West Coast's presentation was concluded and before the protestants presented their evidence, the plaintiffs herein and the other protestants immediately made a motion that the matter be referred to a joint board as provided by the Motor Carrier Act. This immediately brought up the question of the good faith of West Coast Bus Lines, Ltd., in naming the fourth state in its application, and it was so understood by West Coast. West Coast opposed the motion with might and main, even despite the fact that the protestants tendered a stipulation that the record made up to that point in the hearing before the Examiner of the Interstate Commerce Commission be made a part of the proceeding

before the joint board and that the proceeding might continue before the joint board from that point forward. West Coast declined to accept the stipulation and insisted that its application was still one in which four states were proposed to be served. It stated that it would accept a four-state certificate if granted, and that the Interstate Commerce Commission was better able to determine the "national policy with respect to motor passenger transportation" than the local board.

The motion to refer the matter to a local board was denied by the Examiner. Repeated renewals of the motion made thereafter, both oral and written, were all denied either by the Examiner or the Commission.

It is also of some significance that in its responses to these motions before the Commission the explanations given by West Coast for the inclusion of a fourth state and its later abandonment have not only been of the most divergent and varying character, but nearly all of them have been contradictory with one another, and none of the explanations are in accord with the evidence. The simple fact is that West Coast has been unable to give a single supportable reason for the original inclusion and the later abandonment of its proposal to serve the fourth state, and no such reason exists except that it sought to evade a hearing before a joint board of the three states in which alone it proposed to operate.

The report of Division 5 of the Commission shows that bad faith or "fraudulent intent" was charged (32 MCC 620), and this portion of the report of Divi-

sion 5 is by reference made a part of the final decision of the Commission. (p. 270.)

In an effort to show that appellants did not claim bad faith on the part of West Coast in naming the fourth state, the West Coast motion to affirm (pp. 8-9) quotes a few lines from the somewhat lengthy argument that followed the motion to refer to a joint board. But this quotation fails to include the portions of the discussion which clearly show that the good faith of West Coast was questioned then and there. Moreover, the facts themselves plainly disclosed the intent to evade a hearing before the joint board. Even if bad faith or fraud had not been raised before the Commission, the Commission or the District Court should immediately have discontinued the hearing or vacated the certificate of public convenience and necessity as soon as the deception was discovered, with direction to refer the matter to the joint board in conformity with the mandatory provision of the Motor Carrier Act. The question is obviously one of jurisdiction and the rule is too well established to require argument that jurisdiction cannot be obtained by deceptive statement of jurisdictional grounds, such as is clearly represented by the inclusion of Phoenix, Arizona, as a point proposed to be served by the applicant.

We need only add that the record before the Commission shows conclusively and incontrovertibly that prior to the filing of the application West Coast entered into negotiations with another carrier which foreclosed it from seeking any operative right south

of San Francisco. The evidence taken at the hearing is in complete conformity with the understanding reached in these negotiations. The record also contains other conclusive evidence that West Coast had no intention to serve Phoenix when it filed its application. It is obvious therefore that it was never the intent of West Coast to operate between San Francisco and Phoenix, and that the fourth state of Arizona could therefore have only been added for the purpose of evading reference of the proceeding to a joint board, as would have been done had a fourth state not been included in the designation of the route proposed to be served.

III. OWING TO THE UNPRECEDENTED AND RADICAL CHANGES IN CONDITIONS BETWEEN THE TIME OF THE HEARING IN 1938 AND THE FINAL DECISION IN 1942, THE COMMISSION SHOULD HAVE GRANTED A FURTHER HEARING FOR WHICH APPROPRIATE APPLICATION WAS MADE, AND THE FAILURE TO REOPEN THE PROCEEDING WAS A DENIAL OF THE RIGHT TO A FAIR HEARING, PARTICULARLY IN VIEW OF THE FACT THAT THE OFFICE OF DEFENSE TRANSPORTATION HAD IN THE MEANTIME, IN CONFORMITY WITH THE NATIONAL POLICY TO ELIMINATE AND CURTAIL ALL UNNECESSARY DUPLICATIONS IN SERVICE, AND PRIOR TO THE FINAL DECISION OF THE COMMISSION, REQUIRED CURTAILMENT OF THE BUS SERVICES RENDERED BY THE PLAINTIFFS HEREIN.

We believe we need not long dwell upon argument designed to show that unprecedented and most radical changes in conditions occurred between the time of the hearing in this case in the Fall of 1938 and the final decision of the Commission on October 6,

1942, four years later. The transportation of passengers and property has certainly not escaped the impact of these tremendous changes. At the time of the final decision in 1942 conditions were obviously not representative of what they were four years earlier in 1938. But it was argued before the District Court that the Commission could and did take judicial notice of these changes, and hence it properly refused to reopen the proceeding upon the petition filed with the Commission for that purpose. True, the Commission could and, no doubt, did take judicial notice of the fact that World War II had in the meantime broken upon the world, but it cannot take judicial notice of the multitude of changes that had during these momentous four years taken place in respect to the transportation services and operation in any particular service area, such as that between Portland and Seattle or any other single route. Such are obviously not matters of which judicial notice can be taken, since they are not within the actual knowledge of the Commission. They can therefore only be brought before the Commission by way of actual introduction as evidence.

Refusal to grant the petition for reopening of the proceeding for further hearing was under the circumstances present here a denial of a fair hearing. *Atchison, Topeka & Santa Fe Railway Company v. United States,* 284 U. S. 248.

Among the numerous factors in transportation that have suffered radical change, we need only mention by way of illustration the one of operating costs as

shown by the evidence introduced in the District Court. The cost of North Coast's operation in 1938 was 24¢ per bus-mile. By December, 1942, the cost had risen to 37¢. This shows an increase of 13¢ or 55%. In the hearing before the Commission in 1938, West Coast Bus Lines, Ltd., in support of its claim that its proposed operations would be financially feasible, estimated its cost per bus-mile to be 15.36¢. Now, if we are to accept the theory of judicial notice as presented in the motion to affirm, and as accepted by the decision of the District Court, must it then not also be judicially noticed that the West Coast operating cost would now also be 55% higher than its 1938 estimate. And, carrying the theory to its conclusion, it would mean that it must also be judicially noticed that in order merely to defray its expenses West Coast would be required to have an average load at Portland, Oregon, on both its inbound and outbound schedules of 28 passengers in its 25-passenger buses, or an average load of 112% of the seating capacity. Needless to add, such loads would be intolerable in inter-city bus transportation. In fact, it would be impossible of attainment since patronage would shun such service long before any such condition was reached.

Nor is that all. The 1938 estimated cost figure of West Coast of 15.36¢ per bus-mile included an allowance of only 3.18¢ for wages of bus drivers. This was based upon an average of 3¢ per bus-mile for the entire route between San Francisco and Seattle with the exception of some 249 miles in a mountainous

area of northern California and southern Oregon. The Commission's report states that the estimates of expenses of West Coast were "reasonably conservative" (p. 273), despite the fact that the evidence shows conclusively that the going wage rates and costs in Oregon and Washington were in no instance anywhere near as low as 3¢ or 3.18¢ and that the wage rates of North Coast were 3.85¢, and actual costs 4.91¢ per bus-mile. The evidence shows, moreover, that no one connected with West Coast Bus Lines, Ltd., had any information with respect to the going wages for bus drivers, nor had anyone made any investigation to determine the going wages, nor is there any evidence to indicate that it would be successful in its proposal to secure bus drivers at lower wages than those of the other bus operators in the field. Were its costs in connection with wages to bus drivers for the route between Portland and Seattle to be the same as those of North Coast, and there is no reason to suppose that they would be substantially lower, an additional two passengers as the buses left or arrived at Portland would be required by West Coast to meet its operating costs. It would, accordingly, require loads of 30 passengers at Portland in its 25-passenger buses, or loads of 120% of seating capacity to meet its operating costs.

In conclusion it may be stated that in accepting the evidence of West Coast as to its proposed wages for bus drivers of 3¢ per bus-mile, the Commission apparently also failed to take into consideration the provision in the declaration of National Transporta-

tion Policy of Congress (54 Stat. 899, Sept. 18, 1940), that one of the policies to be observed was "to encourage fair wages and equitable working conditions" and that "unfair or destructive competitive practices" were to be avoided. Certainly the granting of a certificate to an operator proposing to undercut the going wages cannot be said to be in conformity with either of these declared policies.

It should finally be noted that subsequently to the hearing on the application, and prior to the final decision on October 6, 1942, the Federal Office of Defense Transportation was created by Act of Congress and was empowered as a war measure to control all the existing transportation services of the nation, with particular reference to the avoidance of unnecessary duplication and wasteful transportation. Pursuant to orders issued by the Office of Defense Transportation, the services of Independent Stages had been entirely suspended and the three limited schedules operated by North Coast had been eliminated—all prior to the granting of the certificate to West Coast to operate a new and additional service. Moreover, the Regional Director of the Western Division of the Office of Defense Transportation gave testimony at the hearing before the District Court that the existing transportation services between Portland and Seattle are adequate, although the services of Independent Stages had been entirely suspended and the three limited schedules of North Coast discontinued.

Under the provisions of the Motor Carrier Act certificates are to be issued only "if it is found * * *

that the proposed service is or will be required by the present or future public convenience or necessity". (49 USCA 307.) It is manifest that the action of the Commission was in conflict with the orders of the Office of Defense Transportation requiring the suspension of existing services on the ground that they represented unnecessary service or duplication. The proposed operations of West Coast would represent nothing but duplication of the existing services. The two actions of the Government can, of course, not be reconciled. And, since the Office of Defense Transportation is vested with the dominant power with respect to the quantity of service, the conflicting finding or order of the Commission cannot stand. The situation is quite analogous to that involved in *Arizona Grocery Company v. Atchison T. & S. F. Ry. Co.*, 284 U.S. 370, where this Court held that because of the conflicting administrative action an order requiring reparation or refund on a freight charge was invalid where the charges collected were not in excess of a rate that the Commission theretofore in another proceeding had found to be not unreasonable. The principle of that case is fully applicable here.

CONCLUSION.

We believe that it is apparent from the foregoing that very substantial questions are presented in this appeal and that the questions should be considered and decided by this Court.

Dated, San Francisco, California,
July 10, 1944.

Respectfully submitted,

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In the District Court of the United States for the Northern District of California, Southern Division

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NORTH COAST TRANSPORTATION COMPANY, A CORPORATION, AND INDEPENDENT STAGES, INC., A CORPORATION, PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

Civil No. 22528–S

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint seeking to set aside an order of the Intersate Commerce Commission. The decree was entered on May 9, 1944. Previously the court on

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February 29, 1944, had entered an order vacating a temporary injunction dismissing the complaint. This order further stated that counsel for defendants might submit findings of fact and conclusions of law in conformity with Rule 52 (a) of the Federal Rules of Civil Procedure. On March 2, 1944, the court filed a written opinion which concluded that the Commission's order was lawful, that the temporary injunction would be vacated, and that the suit would be dismissed. This opinion also stated that counsel for defendants might prepare findings of fact and conclusions of law. Plaintiffs, apparently thinking the above order of February 29, 1944, was a final order, took an appeal therefrom before findings of fact and conclusions of law had been approved by the court. This appeal was allowed on April 18, 1944. On May 20, 1944, these appellees in response to this appeal filed with the District Court a motion to affirm the court's order under Rule 12, paragraph 3 of the Supreme Court Rules. In the interim the District Court on May 9, 1944, had entered an order allowing in part and overruling in part exceptions filed by plaintiffs to findings of fact and conclusions of law submitted by defendants. On the same day the court entered a so-called "final decree" reciting that the court had handed down an opinion and had entered findings of fact and conclusions of law, and ordering that the temporary injunction be denied and the complaint be

dismissed. The present appeal from the "final decree" was allowed on June 10, 1944, and the appeal papers were served on appellees on June 14, 1944.

It is clear from the foregoing that this appeal attempts to review the same action of the District Court as did the earlier appeal, and that this second appeal was necessitated only because the first appeal was prematurely taken. Except for an assignment of error alleging that the court was without power[1] to enter its findings of fact, conclusions of law, and final decree of May 9, 1944, because it had issued a final order on February 29, 1944, the errors assigned on this appeal are otherwise the same as those assigned on the first appeal. For the reasons set forth in our motion to affirm heretofore filed in connection with the first appeal, appellees respectfully submit that the present appeal likewise presents no substantial question and that the final decree of the District Court should therefore be affirmed without argument. In any event, however, the former appeal,

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[1] That there is no basis for this contention is plain from the fact that the court's earlier order, from which the first appeal was taken, specifically stated that defendants might file findings of fact and conclusions of law. While the "final decree" of May 9 may not have been necessary, since it did no more than the earlier order, by the same token it did not harm plaintiffs any more than the earlier order.

having been superseded by this one, should be dismissed.

CHARLES FAHY,
Solicitor General,
DANIEL W. KNOWLTON
Chief Counsel,
Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1944

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 275

NORTH COAST TRANSPORTATION COMPANY AND INDEPENDENT STAGES, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND WEST COAST BUS LINES, LTD., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION TO AFFIRM OF WEST COAST BUS LINES, LTD.

HENRY F. WALKER,
ARTHUR H. GLANZ,
Counsel for West Coast Bus Lines, Ltd.,
Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CIVIL No. 22528-S

NORTH COAST TRANSPORTATION COMPANY, A CORPORATION, AND INDEPENDENT STAGES, INC., A CORPORATION,

Plaintiffs-Appellants,

vs.

THE UNITED STATES OF AMERICA,
Defendant-Appellee,

and

WEST COAST BUS LINES, LTD., A CORPORATION, INTERSTATE COMMERCE COMMISSION ET AL.,
Intervenors-Appellees.

MOTION TO AFFIRM.

Appellee, West Coast Bus Lines, Ltd., hereinafter referred to as "West Coast", pursuant to Rule 12, paragraph 3, moves that the decree of the District Court be affirmed.

This is a direct appeal from the Final Decree [1] of a specially constituted District Court of three judges, established

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[1] The District Court rendered an opinion, dated March 2, 1944, which is reported in 54 Fed. Supp. 448. The opinion was filed on March 3rd. On March 3rd, an "order", dated Feb. 29, was filed vacating the temporary injunction and dismissing the complaint and making provision for the submission by defendant of "findings of fact and conclusions of law in con-

pursuant to the Urgent Deficiencies Act of October 22, 1913, vacating a temporary injunction and dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission.[2]

The Commission's order, dated October 6, 1942, granted West Coast a certificate of public convenience and necessity under Section 207 of the Motor Carrier Act (49 U. S. C. A. 307) to operate as a common carrier by motor vehicle of passengers between San Francisco and Seattle, serving intermediate points, and denied West Coast's application in all other respects. Appellants, operators of similar service over the portion of the route between Portland and Seattle, brought suit to set aside the Commission's order at least in so far as it granted West Coast authority between these points. West Coast and others intervened as defendants.

In its application to the Commission, West Coast sought a certificate authorizing operations between Phoenix, Arizona and Seattle, Washington, via Los Angeles, San Fran-

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formity with Rule 52(a) FRCP." Appellants appealed from this "order", the appeal being allowed on April 18. Service of the documents referred to in Rule 12, paragraph 2, was made on counsel for West Coast on April 21. A document entitled "Position of West Coast Bus Lines, Ltd., re Appeal and Stay by Trial Court", dated April 21, was filed by West Coast on April 22. In point 1 of this document West Coast set forth its position that the "order" dated February 29th was but a preliminary order and not appealable. On May 17th, appellees The United States of America and Interstate Commerce Commission, mailed to counsel for appellants and for the other appellees their "Motion to Affirm".

On May 9th, the District Court filed its Findings of Fact and Conclusions of Law and a Final Decree. Appellants appealed from this Final Decree, the appeal being allowed on June 10, 1944. Service of the documents referred to in Rule 12, paragraph 2, was made on counsel for West Coast on June 14th. The instant Motion to Affirm is directed to this latter appeal, it being West Coast's position that the "order" of Feb. 29 was but a preliminary order and not appealable.

[2] The Commission's decision is reported in 41 M. C. C. 269. An earlier report of Division 5 appears in 32 M. C. C. 619.

cisco, and Portland. The application therefore proposed operations to be conducted involving four states. Under Section 205 (a) of the Motor Carrier Act (49 U. S. C. A. 305 (a)), the Commission referred the application to an examiner for hearing.[3] Proof adduced at the hearing principally related to proposed operations between San Francisco, California and Seattle, Washington.[4] Appellants, at the conclusion of the introduction of evidence by West Coast, moved that the Examiner proceed no further, and assign the matter to a Joint Board. There was no charge of bad faith. This was the first indication of appellants' position in this regard. The motion was denied by the Examiner, and thereafter appellants presented it to the Commission, where it again was denied.

In the Motion to Affirm, filed by appellees The United States of America and Interstate Commerce Commission, the facts were well and succinctly set forth. The following two paragraphs are quoted therefrom and made a part of the instant motion:

"On the merits, the Commission's report points out that there is presently a monopoly of bus transportation between Seattle and San Francisco. Between San Francisco and Portland, bus service is furnished only by the

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[3] Section 205(a) provides in part:

"The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the commission is desirable: Applications for certificates, . . ."

See, also, Interstate Commerce Act, Section 17 (49 U. S. C. A. 17.)

[4] As noted, the Commission's order granted a certificate for operations between San Francisco and Seattle and denied the application in all other respects.

Pacific Greyhound Lines[5] which operates what may be described as a first-class bus service, and its subsidiary,[6] Dollar Lines, which operates what is known as a second-class, low-priced service. Similarly, between Portland and Seattle, service is provided only by appellant North Coast Transportation Company, which conducts first-class bus service, and appellant Independent Stages, Inc., a wholly owned subsidiary of North Coast, which conducts second-class service. Furthermore, because Pacific Greyhound controls Dollar Lines and because North Coast controls Independent Stages, the Commission found that there was no 'real independence of action in matters in which these parties would normally be opposed' (41 M. C. C. at 289). These monopoly conditions were found to have contributed materially to certain deficiencies found to exist in the service of the above carriers, such as insufficient schedules, overcrowding, improper equipment, and employee discourtesy. The Commission found also that insufficient and unsatisfactory second-class service was purposely provided in order to discourage the use of such cheaper service and to compel the use of the affiliated higher priced service. The Commission found that applicant's proposed service was clearly adequate, and promised effective competition with the existing services. In view of the increasing population and increasing bus traffic in the area to be served, as well as the high past earnings of the existing operators, the Commission found that the territory involved would support applicant and that its entry into the field would not jeopardize in any degree the existing carriers.

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[5] The Southern Pacific Company, whose railroad operates between Portland and San Francisco, owns 39.03 per cent of the stock of Pacific Greyhound.

[6] Pacific Greyhound owns 40% of the stock of Dollar Lines, 60% being owned by a Standard Oil subsidiary. Standard Oil sells Pacific Greyhound $600,000 to $700,000 worth of petroleum products annually, and permits Pacific Greyhound to have a free hand in the management of Dollar Lines.

On these and other findings, the Commission made the ultimate finding that the present and future public convenience and necessity required applicant's operation between San Francisco and Seattle.

"The record before the Commission leading to its order of October 6, 1942, was closed on October 5, 1938. On December 12, 1942, appellants filed a petition for rehearing alleging that certain designated changes in conditions, occasioned in most instances by the war, had occurred since the closing of the record, and offering to submit proof concerning them. In this petition, it was alleged specifically: that under regulations of the Office of Defense Transportation applicant would be unable to secure from that agency the required authority to operate; that under the regulations of that agency and of the War Production Board applicant could not secure the necessary buses, operate the proposed number of schedules, furnish service within the 90-day period it proposed before commencing operations, or meet the time schedules it proposed; that applicant would be unable to secure intrastate rights in Washington and that its operations would thus be limited operations forbidden by Office of Defense Transportation regulations; that existing carriers had reduced their rates and improved their service since the closing of the record; and that by reason of changed conditions affecting operating costs and revenues, applicant could not operate on the basis it proposed without suffering serious financial losses such as to jeopardize its chances of continued operation. Applicant on January 4, 1943, filed an extensive reply to this position, following which the Commission on February 1, 1943, denied the petition for rehearing."

Five principal contentions were advanced by appellants in the court below: (1) that the Commission had no jurisdiction to proceed other than to grant appellants' request that the matter be withdrawn from the examiner and re-

ferred to a joint board and therefore that the Commission's order was a nullity; (2) that the Commission made no sufficient findings to support its order; (3) that the evidence was not sufficient to support the Commission's order; (4) that appellants were deprived of their property without due process of law in violation of the Fifth Amendment by the order of the Commission in authorizing West Coast to operate as a competitor along their route; and (5) that the Commission's denial of their petition for rehearing because of "changed conditions" was an abuse of discretion and deprived them of a fair hearing.[7] One additional contention is found in appellants' "Assignment of Errors," based upon the matter set forth in footnote "1", *supra*,

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[7] In their Jurisdictional Statement, served and filed in connection with their appeal from the Final Decree of May 9, 1944, appellants state that they "rely mainly upon three principal grounds of appeal" which are set forth in summary form by appellants as follows:

> "(a) The report and order of the Commission and the inferences or statements in the report upon which the order was based (here regarded as 'findings') are not supported by any substantial evidence, and are, in fact, contrary to the evidence.
>
> "(b) It was not the intent of West Coast Bus Lines, Ltd., either at the time of the hearing or at the time of filing the application, or at any other time, to serve more than three states and it was therefore mandatory under the provisions of Section 205 of the Motor Carrier Act (49 U. S. C. A. 305) to refer the matter for hearing and primary decision to a joint board of the three states in which alone the applicant sought to operate.
>
> "(c) Owing to the unprecedented and radical changes in conditions between the time of the hearing in 1938 and the final decision in 1942, the Commission should have granted a further hearing for which appropriate application was made, and the failure to reopen the proceedings was a denial of the right to a fair hearing, particularly in view of the fact that the Office of Defense Transportation had in the meantime, in conformity with the national policy to eliminate and curtail all unnecessary duplications in service, and prior to the final decision of the Commission, required curtailment of the bus services rendered by the plaintiffs herein."

It is noted that of the five contentions advanced by appellants in the court below, contentions 2 and 4 are not mentioned as being those principally relied upon by appellants on appeal.

i. e., (6) that the Court was without jurisdiction to make or enter Findings of Fact or Conclusions of Law or the Final Decree on May 9, 1944, following the order dated February 29, 1944, and the allowance of an appeal therefrom on April 18, 1944.

In support of these six contentions, and for purposes of appeal, appellants have specified some thirty-four "Assignment of Errors".[8] It is submitted that none of these contentions present any substantial question, that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument, and, therefore, that the decree of the District Court should be affirmed without further argument.

1. Appellants' first contention—that the Commission erred in refusing to take the matter from the Examiner and reassign it to a joint board—is without merit. Section 205 (a) of the Motor Carrier Act (49 U. S. C. A. 305 (a)), quoted *supra,* footnote "3", requires the Commission to refer certain matters to a joint board "when operations conducted or proposed to be conducted involve not more than three States", but does not require such reference when operations "conducted or proposed to be conducted involve more than three States". In this latter situation, it is left to the discretion of the Commission whether reference should be to a joint board or to an examiner. (Section 205 (a), *supra.* See, also, Interstate Commerce Act, Section 17 (49 U. S. C. A. 17). Here, West Coast's applica-

[8] The practice of making so many assignments of error to support so few contentions has been severely condemned by the Supreme Court and it has been stated that such may result in a dismissal of the appeal. (*Patterson* v. *Mobile Gas Co.*, 271 U. S. 131, 70 L. ed. 870, 46 S. Ct. 445; *Local 167, International Brotherhood of Teamsters, etc.*, v. *United States*, 291 U. S. 293, 78 L. ed. 804, 54 S. Ct. 396; *Central Vermont R. Co.* v. *White*, 238 U. S. 507, 59 L. ed. 1433, 35 S. Ct. 865; *Chesapeake & D. Canal Co.* v. *United States*, 250 U. S. 123, 63 L. ed. 889, 39 S. Ct. 407; *Phillips, etc., Const. Co.* v. *Seymour*, 91 U. S. 646, 23 L. ed. 341.)

tion involved operations proposed to be conducted in more than three States. The Commission referred it to an examiner for hearing. The proof related substantially to three States. The issue, therefore, is—Where a matter properly has been referred to an examiner, is it mandatory upon the Commission to take it from the examiner and reassign it to a joint board if the proof before the examiner as to some State or States is inadequate or wholly lacking and the remaining number of States is three or less. To state the issue is to answer it. Appellants' position finds no support in the statute. As stated by Division 5 of the Commission (32 M. C. C. 621) and adopted by the full Commission (41 M. C. C. 270) and quoted by the District Court in its opinion: "In the absence of any showing of any intentional deception or fraud, an application, once lawfully referred either to an examiner or to a joint board of either three or two members, may properly be disposed of by such referee, even though during the course of the hearing applicant wholly fails to support or otherwise abandons his proposal as to one or more states, so that the number actually finally involved is less than originally appeared. Any other conclusion would tend to uncertainty and confusion. In innumerable hearings, jurisdictional issues, requiring final determination before proceeding, would arise as to whether or not there had been a failure of proof as to a particular state." The District Court found that there was no fraud, bad faith, or deception on the part of West Coast in making and filing its application for authority to operate in four states (Finding 3). At the hearing before the Examiner when making their motion, appellants expressly stated that they made no claim of bad faith.[9]

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[9] At the hearing, appellants were represented by Mr. Clifford and the following proceedings occurred: *"Examiner Croft:* I would be inclined to grant your motion, Mr. Clifford, if I thought for a moment there was the slightest thing in the record to indicate bad faith, or any attempt to de-

2. Appellants' second contention—that the Commission did not make sufficient findings to support its order—cannot be supported. It is not found in the "three principal grounds" upon which appellants state they "mainly rely" on this appeal. (See, Appellants' Jurisdictional Statement, *supra*, footnote "7".) The report of the Commission (41 M. C. C. 269) contains numerous findings, both preliminary and ultimate. "There are no formal requirements for the findings to be made by the Commission in this type of case" (*United States* v. *Louisiana*, 290 U. S. 70, 78 L. ed. 181, 54 S. Ct. 28) which does not include an award of damages. (*Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 62 L. ed. 831, 38 S. Ct. 383.) The report, read as a whole, contains more than ample preliminary findings affording a rational basis for its ultimate finding that present and future public convenience and necessity required the granting of this certificate. The question of public convenience and necessity is one of those ultimate questions of fact for determination by the Commission which is composed of experts. The determination thereof by this expert body will not be disturbed if there is a rational basis therefor in the Commission's report. *I. C. C.* v. *City of Jersey City*, — U. S. —, decided May 29, 1944; *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 83 L. ed. 1147, 50 S. Ct. 754; *Mississippi Valley Barge Line* v. *U. S.*, 292 U. S. 282, 78 L. ed. 1260; 54 S. Ct. 692. It is established law that the Commission may permit a new service for the purpose of providing the benefits of reasonable competition in an area, where as here, a virtual monopoly exists. (*Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 75 L. ed. 824, 51 S. Ct. 337.)

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ceive the Commission or prospective third parties. *Mr. Clifford:* I am not charging bad faith. *Examiner Croft:* I know you are not." (Commission's Transcript 1311.) Nevertheless, in paragraphs III-V of their assignments of error, appellants seek to raise, on appeal, the issue of bad faith.

3. Appellants' third contention—that the Commission's order is not supported by the evidence—is groundless. The sufficiency of the evidence was raised by appellants before the full Commission and again before that body by way of petition for reconsideration. The contention was overruled by the Commission. The District Court in its written opinion stated: "The record shows ample and convincing evidence to support the finding of the Commission that the public interest would be served by permitting a competing carrier to operate in plaintiffs' territory."[10] (See also: Finding 6.) It is elementary that the weight and credibility to be given to the evidence is for the Commission and that the conclusions of the Commission must be sustained if supported by substantial evidence. (*The New England Divisions case,* 261 U. S. 184, 67 L. ed. 605, 43 S. Ct. 270; *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 70 L. ed. 941, 46 S. Ct. 500; *State of Ohio* v. *United States,* 292 U. S. 498, 78 L. ed. 1388, 54 S. Ct. 792.)

4. Appellants' fourth contention—that they have been deprived of property without due process of law in violation of the Fifth Amendment by an order permitting a competitor to enter their area—is equally without merit. Appellants' authority to operate was not exclusive; their operation, without competition, was a privilege to be enjoyed as long as existing but was not a legal right. They had no property right to be free from competition, and the order of the Commission permitting a competitor to operate in the area invades no property right of the appellants. (*Indian Valley Ry Co.* v. *United States,* 52 F. (2d) 485, affd., 292 U. S. 608, 78 L. ed. 1469, 54 S. Ct. 775; *Tennessee Power Co.* v. *T. V. A.,* 306, U. S. 118, 83 L. ed. 543, 59 S. Ct. 366.) The

[10] In the court below, appellants limited their contention to the sufficiency of the evidence to show public convenience and necessity in the Portland-Seattle area.

fact that, under regulations of the Office of Defense Transportation, the operations of appellant Independent Stages have been suspended and its equipment taken over and operated by the parent company, appellant North Coast, presents no reason for a different conclusion. As aptly stated by the District Court: "A company whose output is curtailed by rationing obviously may not on that ground keep competitors out of its field. No more may plaintiffs; for after a valid determination that the public would be benefited by the operations of a competing carrier, the right of West Coast to operate is equal to plaintiffs' and subject to the same restrictions." Furthermore, under the operation by North Coast of the combined equipment of appellants, they have substantially increased their profits.

5. Appellants' fifth contention—that the Commission was required to grant their petition for reconsideration because of "changed conditions"—is wholly without merit. The contention is predicated upon the entry of the United States into war following the close of the record and the subsequent creation of various wartime agencies, such as the Office of Defense Transportation, War Production Board, etc. Many of the arguments advanced by appellants under this contention related to predictions of what these other agencies would or would not do. Obviously, the Commission was not and could not be called upon to prejudge or predict what action the various agencies might take with respect to West Coast and the commencement of its operations. It is not every change in conditions which would require the Commission to reconsider a matter. (*United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 77 L. ed. 914, 53 S. Ct. 406.) The subject of "changed conditions" recently was before the Supreme Court and a decision rendered which is determinative of this contention adversely to the appellants. (*Interstate Commerce Commission* v.

City of Jersey City (May 29, 1944), — U. S. —, — L. ed — S. Ct. —.)

6. Appellants' sixth and last contention—that the Dist Court had no jurisdiction or power to make or enter F ings and Conclusions or its Final Decree after the "ord dated February 29, 1944—is equally without support in authorities.[11] It is the position of West Coast, as state the "Position of West Coast Bus Lines, Ltd., re Appe etc., that the "order" dated February 29th, 1944, was b preliminary order; that it was not a final decree; and th fore that it was not appealable. Furthermore, even if order of February 29th be considered as a final appeal decree, such would not render it reversible error for District Court thereafter to make and file its findings conclusions. (*Panama R. Co.* v. *Beckford,* 231 Fed. See, also, *Gibbs* v. *Buck,* 307 U. S. 66, 77-78, 83 L. ed. 1 59 S. Ct. 725.) No possible prejudice could result to ap lants and no substantial right of theirs has been affec (28 U. S. C. A. 391. See, also, Rule 61, Federal Rule Civil Procedure.)

For the foregoing reasons this appeal presents no stantial question. It is, therefore, respectfully submi that the decree of the District Court should be affirmed w out further argument.

Dated: June 23, 1944.

HENRY F. WALKER,
ARTHUR H. GLANZ,
Attorneys for West Coast Bus Lines, Ltd.,
Appellee-Interveno

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[11] The facts pertaining to this contention are set forth in footnote *supra.*

Joinder in Motion.

The undersigned Intervenors-Appellees herein join in the foregoing motion.

NATIONAL TRAILWAYS SYSTEM,
BURLINGTON TRANSPORTATION COMPANY,
SANTA FE TRAIL TRANSPORTATION COMPANY,

By JONATHAN C. GIBSON,
RUSSELL B. JAMES,
WILLIAM F. BROOKS,
STARR THOMAS,
Their Attorneys,
560 So. Main Street,
Los Angeles 13, California.

The undersigned appellees join in the foregoing petition.

FRANK J. HENNESSY,
United States Attorney,
By W. E. LICKING,
Asst. U. S. Atty.
NELSON THOMAS,
Attorney for Interstate Commerce Commission.

(3033)

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 275

NORTH COAST TRANSPORTATION COMPANY (a corporation) and INDEPENDENT STAGES, INC.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WEST COAST BUS LINES, LTD., et al.,
Appellees.

PETITION OF APPELLANTS FOR REHEARING.

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In the Supreme Court
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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WEST COAST BUS LINES, LTD., et al.,

Appellees.

PETITION OF APPELLANTS FOR REHEARING.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the States:

Come now the appellants and petition for a rehearing in the above entitled appeal and for grounds thereof respectfully show:

I. That the Supreme Court has misapprehended the principal grounds of the appeal.

II. That the three decisions cited by the Court in granting the motions to affirm are not in point.

III. That by granting the motions to affirm the Court has denied to appellants the appeal as of right granted to them by statute (28 USCA, sections 47a and 345), notwithstanding that questions of the most substantial and fundamental character are presented.

I.

THE GROUNDS OF THE APPEAL.

As shown by appellants' Statement of Points to be Relied Upon (pp. 1-2) and appellants' Statement as to Jurisdiction (p. 3), the principal grounds of the appeal are, briefly stated, as follows:

1. The order of the Commission and the "findings" upon which it is based are not supported by any evidence and are wholly contrary to the evidence.

2. The Commission was without jurisdiction of the proceeding because, as conclusively shown by the record, the applicant in fact never proposed to operate in more than three states.

3. Because of the radical change in conditions between the time of the hearing and the decision the Commission should have granted a rehearing.

We respectfully submit that more substantial grounds of appeal than the first two above set forth

could not be presented. Certainly the question that the order of the Commission and the "findings" upon which the order is based are not supported by the evidence and are contrary to the evidence, and the further question that under the applicable statute the Commission was without jurisdiction, are questions of a most fundamental character. It would appear that argument should hardly be necessary to maintain the validity of that statement.

As to the third ground of the appeal—the changed conditions between the time of the hearing and the decision—we can readily concede that it might reasonably be contended that since the granting of a rehearing on such ground is primarily one of discretion the appeal on such a ground alone might properly be denied. But we cannot assert too emphatically that, in our view, such is not the case with respect to the first two grounds.

As to the first ground of the appeal, it has always been held—without a single exception so far as we are aware—that, if there is no rational basis for the Commission's order and no real or substantial evidence to support the "findings" with respect to the basic and essential elements upon which the order is based, a substantial question is presented and that that question is properly subject to review by this Court. None of the three decisions cited by the Court supports a contrary view, nor are we aware of any decision or other authority that has ever held or made any declaration to the contrary.

It has always been a governing principle of law, and one heretofore consistently applied by numerous decisions of this Court, that the "findings" as to the basic and essential factors on which an administrative order such as that here involved is based must be supported by the evidence, and where this is not the case the order is subject to the process of judicial review. We may cite the following cases by way of example:

Interstate Commerce Commission v. Union Pacific R. Co., 222 U.S. 541, 547, 548;

Baltimore & Ohio R. Co. v. United States, 264 U.S. 258;

Chesapeake & Ohio Ry. Co. v. United States, 283 U.S. 35;

Federal Radio Commission v. Nelson Bros. B & M Co., 289 U.S. 266.

In respect to the second ground of appeal above stated, it seems equally clear that if West Coast Bus Lines, Ltd., did in fact not propose to conduct operations in more than three states, but named the fourth state in its application solely for the purpose of evading a hearing before a Joint Board under the provisions of the Motor Carrier Act (49 USCA, section 305(a)), that situation also presents a question of the most substantial character. And that question is wholly separate from the first or third ground.

Manifestly, neither of these first two grounds of appeal may be determined upon a motion to affirm. They can, in the very nature of things, only be determined by an examination or consideration of the

record. But such is not the function or office of a motion to affirm. Hence, the dismissal of an appeal pursuant to such a motion would be equivalent to holding that the question of sufficiency of the evidence and the question of jurisdiction of the Commission are not proper grounds of appeal and that an aggrieved party to a proceeding will not be heard where an appeal is based upon either or both of such grounds. We cannot believe that the Court could have intended to make such a ruling, yet that would be the actual effect of the granting of the motions to affirm in this proceeding.

II.

THE CASES CITED IN THE ORDER TO AFFIRM.

We wish to point out more specifically that in none of the cases cited in the order granting the motions to affirm was it held that the question of jurisdiction and the question of sufficiency of the evidence do not constitute substantial grounds for an appeal to this Court.

In *C. & O. Ry. Co. v. United States,* 283 U.S. 35, 42, the case first cited by the Court in the order granting the motions to affirm, the Court fully recognized the right to appeal and the right to be heard. The Court reviewed the case upon the merits and it found not only that "the facts stated in the report" on which the Commission had based its conclusions were adequate, but that they were also "sustained by the evi-

dence" and were "plainly sufficient to support the order" (p. 43). Not only did the Court not hold that the question as to whether the Commission's findings were supported by the evidence was not subject to review, but it examined the evidence and fully discussed its sufficiency. That is all that is sought by the appellants here.

In the second case cited, *United States v. B. & O. R. Co.,* 293 U.S. 454, 465, the Court dealt not with the question of the sufficiency of the evidence, but solely with the question of the sufficiency of the findings as made in the report of the Commission. The case is, therefore, not in point here because as stated in the first ground of appeal (Statement of Points to Be Relied Upon, pp. 1-2) the appellants here have waived the question as to whether "findings" were properly made and have based their appeal on the ground of total want of evidence to support these "findings".

In the third case cited, *Interstate Commerce Commission v. Jersey City,* 322 U.S. ..... (No. 767, October Term, 1943, decided May 29, 1944), the Court again considered the case upon the merits. The Court determined that "each of the findings of fact by the Commission appears to be supported by substantial evidence". If the case was cited by reason of the further holding therein in respect to the right to a rehearing before the Commission and the standing of the Price Administrator under the Emergency Price Control Act in a rate-making proceeding before the

Commission, it will suffice to note that such further holding could have reference only to the third ground of appeal in the instant case relating to changes in conditions, and could have no bearing on the other two wholly separate grounds.

III.

STATUTORY PROVISION FOR DIRECT APPEAL.

The jurisdiction of this Court is invoked under section 210 of the Judicial Code as amended (28 USCA, section 47a) and under section 238 of the Judicial Code as amended (28 USCA, section 345). As provided by section 210, a direct appeal to the Supreme Court may be taken from a final decree made by a District Court of the United States specially constituted under section 47 of Title 28 of the United States Code. Accordingly, an appeal as of right is denied to appellants by the granting of the motions to affirm and the affirmance of the judgment of the District Court, and this result occurs notwithstanding the presentation by the appeal of the substantial and fundamental questions hereinbefore set forth.

Accordingly, Appellants respectfully urge that the motions to affirm be denied, that the appeal be considered at least as to the first and second grounds pre-

sented, and that these questions be determined upon their respective merits.

Respectfully submitted,

JOHN O. MORAN,
FREDERICK W. MIELKE,
FERD J. SCHAAF,
FRED C. DORSEY,
Attorneys for Appellants.

Dated, October 27, 1944.

CERTIFICATE OF COUNSEL.

The undersigned hereby certifies that he is one of the counsel for appellants herein and that the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated, October 27, 1944.

JOHN O. MORAN,
Of Counsel for Appellants.

Nos. 274 and 275. NORTH COAST TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL. Appeals from the District Court of the United States for the Northern District of California. October 9, 1944. *Per Curiam:* In No. 274 the appeal is dismissed. *Hudson & Manhattan R. Co.* v. *Jersey City*, 321 U. S. 755, and cases cited. In No. 275 the motions to affirm are granted and the judgment is affirmed. (1) *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35, 42; (2) *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 465; (3) *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503. *Messrs. John O. Moran, Frederick W. Mielke, Ferd J. Schaaf,* and *Fred C. Dorsey* for appellants. *Solicitor General Fahy, Messrs. Daniel W. Knowlton, Frank J. Hennessy,* and *Nelson Thomas* for the United States et al., *Mr. Arthur H. Glanz* for the West Coast Bus Lines, Ltd., and *Messrs. Jonathan C. Gibson* and *Russell B. James* for the National Trailways System et al., appellees. Reported below: 54 F. Supp. 448.